CIR v Quitsubdue Ltd

Andrew Halkyard examines a recent court decision holding that the principles laid out by the House of Lords in *Sharkey v Wernher* do not apply to Hong Kong

The landmark decision of the House of Lords in *Sharkey v Wernher* [1956] AC 58 has routinely been applied in Hong Kong by the Inland Revenue Board of Review to tax unrealised profits upon reclassification of assets from trading stock to investment: see, eg, *BR 21/76* 1 IRBRD 291 and *D 55/90* 5 IRBRD 420, (1991) HKRC §80-086.

The above cases can be contrasted with *D 75/96* 12 IRBRD 19, (1997) HKRC §80-491. In the latter case the Board refused to accept that *Sharkey v Wernher* applied in Hong Kong to tax a notional profit, even though it accepted that there had been a change of intention relating to property held by a company, from trading stock to capital asset, upon a change of shareholding in the company. Yuen J in the Court of First Instance has now upheld the decision, but not the reasoning, of the Board: see *CIR v Quitsubdue Ltd* (HCIA No 5/98) (30 April 1999).

The facts of the *Quitsubdue* case are as follows. The taxpayer, a private company, bought all the units in two buildings in 1986. It began to redevelop the properties in 1987. A new building was completed and the units subsequently rented out. The shares in the taxpayer company were sold twice in 1987, the second sale being to the present shareholders.

The Commissioner of Inland Revenue raised on the taxpayer an additional profits tax assessment for the year of assessment 1987/1988 on the basis of a change in intention by the taxpayer. According to the Commissioner, the taxpayer's intention from the time of acquisition of the properties in 1986 had been to trade in the properties but that subsequently it changed its intention in September 1987 and started holding them as fixed assets when the shares were transferred to the current shareholders. Using the principle in *Sharkey v Wernher*, the taxpayer's taxable profits were calculated as the difference between the cost and market value of the properties as at the date of the change in intention.

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On appeal, the Board of Review found that the taxpayer had acquired the properties as trading stock but that in September 1987 there had been a change of intention to hold them as fixed assets. However, since the properties had never been disposed of by the taxpayer, no profits tax could be raised on the notional profit assessed. The Commissioner appealed. A further question of law for the court's opinion was added by the taxpayer, namely, that the properties were never acquired by it as trading stock and thus there could be no question of any change of intention. This question was allowed despite objection by the Commissioner.

Initial Intention

Unlike the Board of Review, Yuen J decided that the taxpayer had acquired the properties as fixed assets. Thus there had been no change of intention in September 1987. Yuen J considered the following factors, none of which in themselves was conclusive, important: the consistent treatment in the financial statements showing the properties as fixed assets and not trading stock; the warranties (backed up with personal indemnities) given by the respective shareholders on sale of their shares that the taxpayer had not since its incorporation carried on any business other than the purchase and holding of the properties; the repossession by the taxpayer of units so as to obtain vacant possession for re-development; the continued holding of the properties and the fact that they had been neither disposed of nor put up for sale; and the obtaining of adequate finance for the re-development of the properties consistent with the intention of holding them as fixed assets.

Yuen J also stated that the intentions of the taxpayer's original shareholders in relation to their shares did not reflect on the taxpayer's intention for the properties (compare *Beautiland Co Ltd v CIR* (1991) 3 HKTC 520).

Application of *Sharkey v Wernher* in Hong Kong

Although strictly not necessary for her decision, Yuen J went on to hold that the principle in *Sharkey v Wernher* did not apply in Hong Kong whether generally or in the circumstances of this case. A person cannot make a profit trading with himself. If, contrary to her findings above, the taxpayer withdrew the properties from trading stock to fixed assets, Yuen J decided that there should be an adjustment in its accounts to write back all the expenses previously deducted for tax purposes in relation to those properties. This reasoning effectively

upholds the minority decision in *Sharkey v Wernher*.

The judgement of Yuen J is particularly important in the Hong Kong profits tax context. The application of *Sharkey v Wernher* in Hong Kong has long been a vexing question. Even though the Commissioner may not be overly concerned by the decision relating to the taxpayer's initial intention, he is doubtless concerned about the implications of *Sharkey v Wernher* not being applied to tax notional profits upon a change of intention. Although it is understood that the Commissioner has lodged no further appeal, it would not be a surprise to find that the Commissioner will look for another case to test the issue in the Court of Appeal or beyond.

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慣例已否改變？

最近法院在一宗案件中裁定，英國上議院在 *Sharkey v Wernher* 一案中訂立的原則不適用於香港。賀雅德加以剖析

引言

英國上議院在 *Sharkey v Wernher* [1956] AC 58 案中所作的極為重要的判決，一向以來在香港慣常地被稅務上訴委員會引用，以於把資產由營業存貨被重新分類為投資時，就未實現利潤徵稅。以下案例是一些好例子：*BR 21/76* 1 IRBRD 291 及 *D 55/90* 5 IRBRD 420，(1991) HKRC § 80-086。

上述兩案與 *D 75/96* 12 IRBRD 19, (1997) HKRC § 80-491 案成了對比。該案中稅務上訴委員會雖然認定，當持有物業公司的持股出現變動時，公司的意圖被視為由持有物業作為營業存貨轉變為持有物業作為資本資產，但卻拒絕援用 *Sharkey v Wernher* 一案以就假定的利潤徵稅。委員會之裁決（但非背後理據）現已得到原訟法庭法官袁家寧確認：見 *CIR v Quitsubdue Ltd*（高等法院稅務上訴 1998 年第 5 號）（1999 年 4 月 30 日）。

涉案問題

Quitsubdue 一案的案情如下：納稅人為一家私人公司，它於 1986 年購入兩幢大廈的所有單位，並於 1987 年重新發展該些物業，建成一幢大廈。該幢大廈的單位隨後被租出。納稅人公司的股份於 1987 年曾兩度被出售，第二次的買家為該公司現時的股東。

在 1987/88 年度的稅項評估中，稅務局局長向納稅人徵收了一項額外的利得稅，理由為納稅人的意圖有所改變。據稅務局局長稱，納稅人自 1986 年購入有關物業起，其意圖是使用物業作貿易用途，但該意圖於 1987 年 9 月出現轉變，當公司股份轉售至現時股東時，公司開始持有物業作為固定資產。稅務局援用了 *Sharkey v Wernher* 一案的原則，並計算出納稅人所賺的應課稅利潤，是在納稅人意圖轉變當日有關物業的成本與市值的差額。

納稅人對上述評估提出上訴。稅務上訴委員會裁定，納稅人確曾買入有關物業作為營業存貨，而該意圖於 1987 年 9 月轉變為持有物業作為固定資產。縱是如此，鑒於納稅人從未處置該些物業，稅務局不能在其評估的假定利潤上徵收利得稅。稅務局局長就此裁決提出上訴，而納稅人也順帶要求法院就如下法律問題提供意見：納稅人從來沒有購入有關物業作為營業存貨，故此根本談不上有任何意圖上的轉變。稅務局局長對此問題提出反對，但納稅人的要求終獲批准。

最初的意圖

跟稅務上訴委員會不同，袁家寧法官裁定納稅人從未曾購入有關物業作為營業存貨。故此，於 1987 年 9 月，納稅人的意圖並沒有出現變化。法官認為以下各項因素相當重要，縱使每項因素本身不具決定性：（一）財務報表恆常地把物業視為固定資產而非營業存貨處理；（二）各名股東售賣其股權時作出保證，擔保納稅人公司自成立以來，除了買入及持有物業外，未有經營任何業務。這些保證更得到了個人彌償擔保的支持；（三）納稅人取回物業各單位的管有權，以取得空置情況下的管有，以便重新發展物業；（四）納稅人持續不斷地持有物業，亦未有處置或嘗試出售物業；及（五）納稅人為重新發展項目取得足夠的融資，這與納稅人意圖持有物業作為固定資產一點是一致的。

袁家寧法官亦指出，納稅人公司的原有股東對於其股權的意圖，並不反映納稅人本身對有關物業的意圖（比較 *Beautiland Co Ltd v CIR* (1991) 3 HKTC 520 一案）。

Sharkey v Wernher 在香港的適用性

縱使並非作出裁決所需，袁家寧法官接而裁定，不論就本案而言還是整體來說，*Sharkey v Wernher* 一案的原則不適用於香港。沒有人能與自己營商而獲利。法官認為，即使納稅人確曾把物業的性質由營業存貨轉變為固定資產，納稅人的帳目應作出調整，早前就稅務而言獲得扣減的與物業有關的開支，應予以轉回。這實際上確認了 *Sharkey v Wernher* 案中上議院的少數判決。

袁家寧法官的判決，對於香港利得稅制尤為重要。*Sharkey v Wernher* 一案在香港的適用性，長久以來都是一個相當惱人的問題。即使稅務局局長或不會太關心有關納稅人最初意圖的裁決，但無疑會關心 *Sharkey v Wernher* 一案不能用以向改變意圖的納稅人徵收假定利得稅從而產生的含義。據了解，稅務局局長沒有對袁家寧法官的判決提出上訴。然而，若我們發覺局長在另一宗合適的個案中再次向上訴法庭或更上級法院提出以上爭議點，也不應感到驚訝。

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